

Brownfields Study Group - Lender Subgroup Meeting Minutes

November 7, 2016, 10:00 a.m. to 12:00 p.m.

Room 513, GEF 2 Building, 101 South Webster, Madison, WI (and via teleconference)

Attendees:

Christopher H. Valcheff, True North Consultants, Inc.
Adam Gallagher, Dane County Treasurer
Marita Stollenwerk, TRC Environmental Corporation (by phone)
Jodie Peotter, Ramaker & Associates (by phone)
Mark Thimke, Foley & Lardner, LLP
Jennifer Drury Buzicky, Husch Blackwell
Michael Prager, DNR
Jessica Kramer, DNR
Molly Schmidt, DNR
Mark Miller, Investors Community Bank
Scott Birrenkott, Wisconsin Bankers Association (by phone)
David Ruetz, GZA Geoenvironmental, Inc.

Minutes:

ITEM 1: Introductions and agenda repair.

Meeting participants introduced themselves. Mark Thimke stated that in October, he had raised lender issues to the Brownfields Study Group, and a small group would meet soon to discuss legislative ideas and proposals; these proposals would need to be vetted according to their importance to brownfields remediation and redevelopment goals. An omnibus bill might be a possibility, with multiple purposes, including carrying any overflow from the 2015 Brownfields Study Group Report and clarifying any adjustments needed after the passage of 2011 Wisconsin Act 21.

ITEM 2: Review and discussion regarding a proposal relating to the lender liability exemption to the hazardous substances spills law, Wisconsin Statutes (Wis. Stat.), section (§) 292.21, and the use of limited liability corporations by lenders.

Jennifer Buzicky stated that the proposal that was being worked on by members of this group was still in progress. The goals are to put together a paper with background, basic concepts, and drafting instructions, with the idea that the proposal would eventually go to the Legislative Reference Bureau, which would direct the drafting of the proposed bill's language. The basic concept of the proposal is to extend the protections currently offered to lenders under Wis. Stat. § 292.21 to wholly owned subsidiaries of lenders; however, some details are still under discussion. She asked whether the proposal should be limited to banks.

A banker in attendance stated that, in his experience, this proposal would be applicable to banks; however, others with experience in different areas outside of banking might be able to comment further. Banks could be divided into two groups: stated-chartered and non-state-chartered. The two groups would be regulated by different bodies of government. DFI has to approve the creation of fully

owned subsidiaries by state banks. Jennifer Buzacky asked whether the proposal would encourage brownfield lending, the banker agreed that it would.

Mark Thimke stated that there were already protections for lenders in statute, and asked how lending practices may have changed since the 1990s to make this proposal necessary. A banker in attendance stated that it was partially the evolution of banking over time. Mark Thimke added that there was some concern about a blanket approach to opening the door to subsidiaries, and some concern about what the proposal would mean in practice.

A banker in attendance stated that approval from the Dept. of Financial Institutions (DFI) would be a significant protection. Banks must define the purpose and amount of assets that will be held by the limited liability corporation (LLC).

An attendee asked whether LLCs used by banks typically had assets. A banker replied that banks usually hoped to not put anything in a LLC. Only nonperforming assets would go in. If there's a deed-back to the bank and the bank puts the property in the LLC, there's a transfer fee. This is purely on the collection side. Banks are obligated to protect assets.

The attendee asked how the proposal would encourage brownfields lending. A banker responded that, in cases where a bank is deciding to take on a property that is "going south", the bank can avoid putting all assets of the bank at risk with an LLC. Banks would be more likely to lend in the first place if this option is available for collateral.

Mark Thimke asked whether the purpose was to insulate the bank from environmental liabilities. A banker replied that it was one purpose; but there are other types of liabilities, e.g., labor and employment, for which LLCs can be used to protect the assets of the bank. Mark Thimke then asked whether the proposal intended that liability attach to bank and its subsidiaries or just the subsidiaries; a banker replied that liability would attach solely to subsidiaries. Mark Thimke and Jennifer Buzacky stated that another concern with the proposal was the potential inability for the State to cross the line between subsidiary and bank for the purposes of addressing a spill. A banker in attendance stated that a bond or letter of credit at a certain dollar amount could address this concern; the proposal was not intended to shield banks in this way.

The group briefly discussed the role of personal property and fixtures. Jennifer Buzacky stated that concerns in this area may be addressable with guidance from the agency, unless Act 21 barred this type of guidance. Banks can sell personal property or fixtures without taking title.

A banker provided an example of a situation where the bank may prefer that a LLC hold a property: a farm that is turned over to the bank needs to continue operation and maintenance of crops and livestock in order to retain its value; however, farms are places where employees are frequently hurt.

Jennifer Buzacky asked how banks using LLCs would ensure that funds are available for performing environmental assessments at properties. A banker stated that a bond could be used; however, there is

some question regarding the accounting consequences and whether the bond would dip into bank capital; that is an accounting question.

Mark Thimke stated that the original exemption created some exposure for lenders as an incentive to follow the process.

An attendee asked whether the proposal could be set up as part of DFI approval for a LLC. A banker replied that it was frequent practice for banks to set up a LLC for use over four or five years for dozens of properties. An attendee asked whether the value fluctuated; the banker replied that it did. Banks that did not seek DFI approval for a LLC would be limited in the type of investments it could hold.

Jennifer Buzacky stated that the availability of assets for a cleanup was still a concern. A banker stated that in sale and leaseback situations, a bank could sue its own LLC to clear title.

Jennifer Buzacky stated that the general purpose of the lender liability exemption needs to be addressed. Michael Prager asked what responsibilities banks have outside of the Hazardous Substances Spills Law, and stated that the purpose of the proposal should be clear. A banker stated that banks did not want to own properties in the long term, Other Real Estate Owned (OREO) penalties applied to properties on the books for a certain number of years. A consultant in attendance added that there had been an additional question as to whether protections could be assigned in the event of a bank merger. Mark Thimke and a banker agreed that it should go with the bank. Jennifer Buzacky asked staff to follow up on this question.

A banker in attendance asked whether the language regarding “enforcement of a security interest” within Wis. Stat. § 292.21 was a concern for deed in lieu transactions. Jennifer Buzacky asked whether the issue would require a separate proposal. The parties briefly discussed the distinctions between the personal property and real property exemptions for lending. An attendee asked whether the question from the last meeting regarding how LLCs used for lending were regarded under CERCLA.

Jennifer Buzacky asked whether there were any further concerns under this agenda item. Mark Thimke stated that the authors of the proposal should keep the timing of the proposal in mind. He stated that he and Jennifer Buzacky would assist attendees with refining the proposal and distributing for subcommittee review.

ITEM 3. General update and discussion by Lender Liability Exemption Subcommittee members regarding items highlighted for discussion during the first three meetings of the Lender Liability Subcommittee, led by Jennifer Buzacky.

[Included in discussion below].

ITEM 4. Discussion of any remaining items within Wis. Stat. Chapter 292.21, including, but not limited to, the following statutory paragraphs and subsection:

- a. Wis. Stat. § 292.21 (1) (a) Lending;
- b. Wis. Stat. § 292.21 (1) (d) Personal property and fixtures; and
- c. Wis. Stat. § 292.21 (2) Responsibility of representatives.

Jennifer Buzacky stated that the issues under Item 4 had been discussed to some extent at previous meetings and asked if there were remaining concerns. Michael Prager asked if anyone in attendance could explain how receivership works in a banking context. A banker in attendance provided an example: a bank has a customer that is insolvent. In order to foreclose, the borrower has assets that need to be maintained and managed (e.g., an apartment complex, farm, or manufacturing business), so the bank appoints a receiver, an officer of the court, that is obligated to manage the property in the best interests of all parties. The receiver can shut down the business, get permission for action, etc. Sometimes receiver is a bank employee, but the employee is still an officer of the court.

An attendee raised concern about mergers and acquisitions of banks. The group discussed whether banks would keep exemption protections if there were a merger of two banks. DNR staff was asked to look into this issue.

A banker in attendance asked whether a bankruptcy trustee would be included under the definition of “representative”. The group discussed this issue.

The group discussed the “operation of a business” language within the personal property and acquisition exemptions for lenders in Wis. Stat. 292.21.

ITEM 5. Next steps.

DNR staff will look into if lender exemption extends after a bank merger.

An attendee of a previous meeting was slated to look into whether fully owned subsidiaries LLC can get lender exemption under CERCLA.

Jennifer Buzacky stated that the only proposal generated by the group at this point was the one regarding LLCs. She asked if attendees had any other concerns or requests.

Mark Thimke stated that several members of the group would continue to work on the proposal and circulate it as discussed. He thanked attendees for their time and comments.